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Office Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

**No. 5 Original.**

STATE OF WISCONSIN, STATE OF MINNESOTA, STATE OF OHIO, AND STATE OF PENNSYLVANIA,
*vs.* *Complainants,*
STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO,
*Defendants,*
STATE OF MISSOURI, STATE OF KENTUCKY, STATE OF TENNESSEE, STATE OF LOUISIANA, STATE OF MISSISSIPPI, AND STATE OF ARKANSAS,
*Intervening Defendants.*

**No. 8 Original.**

STATE OF MICHIGAN,
*Complainant,*
*vs.*
STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, ET AL.,
*Defendants.*

**No. 9 Original.**

STATE OF NEW YORK,
*vs.* *Complainant,*
STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO, ET AL.,
*Defendants.*

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**APPLICATION OF STATES OF MISSOURI, KENTUCKY, TENNESSEE, LOUISIANA, MISSISSIPPI AND ARKANSAS, INTERVENING DEFENDANTS, FOR MODIFICATION OF DECREE UNDER THE PROVISIONS OF PARAGRAPHS 6 AND 7 THEREOF AND FOR ENLARGEMENT OF PENDING REFERENCE TO REPORT IN CONNECTION WITH SUCH APPLICATION.**

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THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The States of Missouri, Kentucky, Tennessee, Louis-

iana, Mississippi and Arkansas, intervening defendants, by their respective attorneys general and special counsel herein, respectfully show to the court that:

1. This application is filed under and pursuant to the provisions of paragraphs 6 and 7 of the decree entered in these causes which paragraphs read as follows:

> "6. That on the coming in of each of said reports, and on due notice to the other parties, any of the parties to the above-entitled suits, complainants or defendants, may apply to the Court for such action or relief, either with respect to the time to be allowed for the construction, or the progress of construction, or the methods of operation, of any of said sewage treatment plants, *or with respect to the diversion of water from Lake Michigan,* as may be deemed to be appropriate.
>
> "7. That any of the parties hereto, complainants or defendants, may, irrespective of the filing of the above-described reports, apply at the foot of this decree for any other or further action or relief, and this Court retains jurisdiction of the above-entitled suits for the purpose of any order or direction, or modification of this decree, or any supplemental decree, which it may deem at any time to be proper in relation to the subject matter in controversy."

Under the foregoing provisions of the decree, as your applicants are severally informed and believe, it is their right and responsibility to bring to the attention of this court any change of circumstances which might affect the propriety of the terms of the original decree and which would call for modification thereof. In view of the facts hereinafter set forth and in performance of this duty and within the terms of the decree, your applicants file this application for further relief.

2. After the original bill of the State of Wisconsin in the above-entitled cause was amended on October 5, 1925, by the addition of the States of Minnesota, Ohio and Pennsylvania as coplaintiffs, your applicants, the

States of Missouri, Kentucky, Tennessee and Louisiana, respectively, filed petitions for leave to intervene in this cause and to be made intervening defendants, which was allowed and thereupon filed a joint and several answer and subsequently, on similar petitions, the States of Arkansas and Mississippi became intervening defendants and adopted the answer of the other Mississippi Valley states. The original bill sought to set aside and have declared void, a permit issued by the Secretary of War pursuant to the provisions of Section 10 of the Rivers and Harbors Act of March 3, 1899, authorizing the diversion of water from Lake Michigan through the Chicago Drainage Canal into the Illinois River and thence into the Mississippi. The intervening defendant states presented their answer for the purpose of showing to this court the benefits to navigation both on the Illinois and Mississippi Rivers resulting from such diversion of water from Lake Michigan and for the purpose of showing to the court that such navigation benefits were proper and lawful for the Secretary of War to consider in determining upon the issuance of such permit.

3. The cause being at issue and two later original bills being consolidated therewith for hearing, the consolidated causes were referred to a Special Master of this court, who conducted hearings, received evidence and in due course filed his report.

In reference to the contentions of applicants herein, the intervening Mississippi River states, the Special Master held that with a diversion of approximately 5,000 c. f. s., the depth in the Illinois Waterway connecting Lake Michigan and the Mississippi River on the plans approved by the War Department, which were based on such assumed flow would be approximately 9 feet, and that the then diversion of water contributed about 4 feet

of the low water depth of 7 feet in the Illinois River below its improvement by locks and dams; and further held that the diversion of water from Lake Michigan during low water periods to an extent not determined, increased navigable depths over bars on the Mississippi River to an amount to justify consideration by the Secretary of War. The Master recommended that inasmuch as the bills sought to set aside the permit which he held to be valid, the bills should be dismissed for want of equity.

4. Thereupon the case came on before this court and on January 14, 1929, its opinion was handed down in which the contentions of the intervening defendant states, applicants herein, were disposed of in the following expressions:

> "The intervening states on the same side with Illinois, in seeking a recognition of asserted rights in the navigation of the Mississippi, answered denying the rights of the complainants to an injunction. They really seek affirmatively to preserve the diversion from Lake Michigan in the interest of such navigation and interstate commerce though they have made no express prayer therefor. In our view of the permit of March 3, 1925, *and in the absence of direct authority from Congress for a waterway from Lake Michigan to the Mississippi, they show no rightful interest in the maintenance of the diversion.* Their motions to dismiss the bills are overruled and so far as their answer may suggest affirmative relief, it is denied."

5. Pursuant to directions in said opinion a further reference was held which resulted in the entry of the decree of August 21, 1930, paragraphs 6 and 7 of which are quoted above.

6. In the year 1930 the Congress adopted an act entitled "An Act Authorizing the construction, repair, and preservation of certain public works on rivers and

harbors, and for other purposes" approved July 3, 1930. This Act contains among other provisions the following:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following works of improvement are hereby adopted and authorized, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers, in accordance with the plans recommended in the reports hereinafter designated.
>
> * * * * * *
>
> "Illinois River, Illinois, in accordance with the report of the Chief of Engineers, submitted in Senate Document Numbered 126, Seventy-first Congress, second session, and subject to the conditions set forth in his report in said document, but the said project shall be so constructed as to require the smallest flow of water with which said project can be practically accomplished, in the development of a commercially useful waterway: *Provided,* That there is hereby authorized to be appropriated for this project a sum not to exceed $7,500,000: *Provided further,* That the water authorized at Lockport, Illinois, by the decree of the Supreme Court of the United States, rendered April 21, 1930, and reported in volume 281, United States Reports, in Cases Numbered 7, 11, and 12, Original—October term, 1929, of Wisconsin and others against Illinois, and others, and Michigan against Illinois and others, and New York against Illinois and others, according to the opinion of the court in the cases reported as Wisconsin against Illinois, in volume 281, United States, page 179, is hereby authorized to be used for the navigation of said waterway: *Provided further,* That as soon as practicable after the Illinois waterway shall have been completed in accordance with this Act, the Secretary of War shall cause a study of the amount of water that will be required as an annual average flow to meet the needs of a commercially useful waterway as defined in said Senate document, and shall, on or before January 31, 1938, report to the Congress the results of such study with his recommendations as to the minimum amount of such flow that will be required annually to meet

the needs of such waterway and that will not substantially injure the existing navigation on the Great Lakes to the end that Congress may take such action as it may deem advisable."

Applicants allege that in and by the act aforesaid Congress gave direct authority for a waterway from Lake Michigan to the Mississippi and thereby removed any legal bar to due and proper consideration of the rights of applicants, the intervening Mississippi River states, and thereby made relevant for consideration the findings of the original report of the Special Master first appointed by the court in these cases.

7. Upon the coming in of the report of the Special Master in these causes on the re-reference upon which the said decree of August 21, 1930 was entered, the court filed an opinion in which the court said:

"All action of the parties and the court in these cases will be subject, of course, to any order that Congress may make in pursuance of its constitutional powers and any modification that necessity may show should be made by this court." (281 U. S. at 198.)

8. Your applicants herein, the intervening defendant Mississippi River states, show that the works which control and regulate the amount of diversion from Lake Michigan, to be taken therefrom by the Sanitary District of Chicago, are owned, constructed, controlled and operated by the latter, except subject to certain supervision by the District Engineer of the United States at Chicago as provided in said decree and the permit of the Secretary of War; that in and by said decree it is provided that on and after December 31, 1938 the said defendants —the State of Illinois and the Sanitary District of Chicago—are enjoined from diverting, as provided in the decree, in excess of the annual average of 1500 c. f. s. in addition to domestic pumpage and applicants herein al-

lege that the said decree should be modified to conform to the requirements of the foregoing act of Congress. Your applicants allege that they are informed that the waterway connecting Lake Michigan with the Mississippi River by way of the Sanitary Canal of said Sanitary District of Chicago and the Illinois and Desplaines Rivers will be complete and open for navigation in the spring of this year and that after a reasonable period for the experience of such navigation and proper development thereof on said waterway and the period of trial necessary for the successful operation thereof, the Secretary of War will be in a position to make the investigation provided for in said act of Congress aforesaid and determine as therein provided the smallest flow of water from Lake Michigan necessary for the development of a commercially useful waterway, which amount when so determined may call for a diversion in excess of the amount provided under the terms of said decree on and after December 31, 1938; and your applicants allege that as suggested in the opinion of this court, the decree should be modified to accord with the action taken by Congress after the decision of this court had been announced, the opinion last above referred to having been handed down April 14, 1930.

9. Your applicants herein, the intervening Mississippi River states, show to the court that upon the application of the States of Wisconsin, Minnesota, Ohio and Michigan at this term of court for a rule upon the State of Illinois and Sanitary District as to the taking by them of appropriate steps to effect compliance with the requirements of said decree, this court has appointed the Hon. Edward F. McClennen Special Master to consider certain questions raised by said application of the complaining states and report on or before April 1, 1938; and your applicants herein, the Mississippi River states,

suggest that the reference to the said Edward F. McClennen, Special Master, should be enlarged to give consideration to the facts alleged herein with directions to recommend to the court such modification of the decree as the facts require.

10. Applicants herein, intervening defendants, show to the court that in and by the order of reference providing for the hearing about to be conducted by the Hon. Edward F. McClennen, Special Master, he is directed to inquire concerning reasons why plans for control works at the mouth of the Chicago River and steps for the construction thereof have not been taken or approved. Applicants allege and so state the fact to be that the engineering questions involved in deciding the nature and character of such control works depend in a large degree upon the final flow from the lake and further that the necessity for such control works likewise depends to a considerable extent upon the amount of permitted diversion. Applicants, therefore, allege that no consideration of these questions can be given without the question as to the ultimate diversion becoming involved and, therefore, it becomes necessary and appropriate in considering said questions that the decree be modified to comply with the said Act of Congress aforesaid, or at least consideration to said act of Congress be properly and appropriately given by the said Special Master.

WHEREFORE your applicants, the States of Louisiana, Missouri, Kentucky, Tennessee, Arkansas and Mississippi, pray that this court enter an order enlarging the reference heretofore made to the Hon. Edward F. McClennen, as Special Master, to determine what modification of the decree of August 21, 1930, is required to make the same conform to the action of Congress taken by the said Rivers and Harbors Act of 1930 above set forth with leave to the parties, including the applicants herein, to

appear before said Master, introduce any relevant testimony in connection with the allegations hereof and with directions to the said Special Master to report such facts and make such recommendations as equity and justice may require and for such other and further relief in the premises as shall seem just and meet.

JAMES O'CONNOR,
*Attorney General for Louisiana.*

L. D. SMITH,
*Attorney General for Tennessee.*

G. L. RICE,
*Attorney General of Mississippi.*

H. L. NORWOOD,
*Attorney General of Arkansas.*

STRATTON SHARTEL,
*Attorney General of Missouri.*

J. W. CAMMACK,
*Attorney General of Kentucky.*

DANIEL N. KIRBY and
CORNELIUS LYNDE,
*Of Counsel for said Intervening defendant Mississippi River States.*

U. S. OF AMERICA,
STATE OF ILLINOIS,
COUNTY OF COOK. } ss.

CORNELIUS LYNDE being first duly sworn on oath deposes and says that he is solicitor and of counsel for the intervening Mississippi River states, on whose behalf the foregoing application and petition has been prepared and filed; that he has read the foregoing application and petition and knows the contents thereof and that the same is true, except as to the allegations therein made on information and belief and as to such allegations this affiant verily believes the same to be true.

CORNELIUS LYNDE.

Subscribed and sworn to before me this 5th day of January, A. D. 1933.

JEFFREY SHEDD,
*Notary Public.*

(NOTARIAL SEAL)